No. 11555

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PAUL J. ZIEGLER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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Jurisdictional Statement.

This is an appeal from a judgment of conviction entered in the United States District Court for the Southern District of California, after verdict of a jury, wherein the Appellant was found guilty on all counts of an Information in eight counts filed in said District Court, charging him with violating Third Revised Ration Order No. 3, Sec. 15.7(d), and General Ration Order No. 8, Sec. 2.9, relating to ration documents and sugar rationing, promulgated pursuant to the Second War Powers Act of 1942, Sec. 301, 50 U. S. C. A. App., Sec. 633 *et seq.* The violations are alleged to have occurred in Los Angeles County, California, within the Central Division of the Southern District of California [R. 2-8].

The jurisdiction of the District Court was based upon the Second War Powers Act of 1942, Sec. 301, 50 U. S. C. A. App., Sec. 633(6).

This court has jurisdiction to entertain this appeal under the provisions of Sec. 128 of the Judicial Code as amended, 28 U. S. C. A., Sec. 225.

Statement of the Case.

The Appellant was convicted after trial before a jury in the United States District Court for the Southern District of California on February 18, 1947, on all counts of an Information in eight counts filed in said District Court, charging him with four violations of Sec. 157(d) of Third Revised Ration Order No. 3 (Counts ONE, THREE, FIVE and SEVEN) and four violations of Sec. 2.9 of General Ration Order No. 8 (Counts TWO, FOUR, SIX and EIGHT), both of which ration orders were issued pursuant to authority granted the President by Congress in the Second War Powers Act of 1942, Sec. 301, 50 U. S. C. A. App., Sec. 633 [R. 2-8]. The West Coast Supply Company, a partnership, was made a co-defendant with the Appellant in the Information; however, a judgment of acquittal to all counts was ordered entered by the District Court as to that defendant [R. 442-3].

More particularly, Count ONE of the Information charged that the defendants did wilfully issue and cause to be issued a sugar ration check for an amount larger than the balance in the account on which it was drawn, less the amount of outstanding checks drawn on that account. Counts THREE, FIVE and SEVEN are similar to Count ONE except that each of these counts alleges a different sugar ration check. Counts TWO, FOUR, SIX and EIGHT charge that the defendants did wilfully and unlawfully receive a rationed commodity, namely sugar, in exchange for a sugar ration check drawn by defendant Ziegler on the account of the West Coast Supply Company when the defendants knew that the ration document was not validly issued because the West Coast Supply Company did not have a balance in its account sufficient to cover the check.

All the checks are alleged to have been issued on or about July 1, 1946, in Los Angeles County, California, and all the sugar is alleged to have been received during

a period from on or about July 3, 1946, to on or about August 17, 1946. The sugar allegedly received by the defendants, as charged in the even-numbered counts is charged to be the sugar obtained by means of the alleged illegally issued ration checks referred to in the odd-numbered counts. The odd-numbered counts purport to allege violations of Third Revised Ration Order No. 3, Sec. 15.7(d), and even-numbered counts purport to allege violations of General Ration Order No. 8, Sec. 2.9. (These ration orders are set forth in the Appendix.)

Prior to trial, the Appellant moved to dismiss the Information and the Appellee moved to strike the Appellant's motion to dismiss, both of which were denied, whereupon the Appellant entered a plea of not guilty to each count and the cause was set for trial on February 4, 1947 [R. 9-10].

The Appellee moved to amend the Information, which motion was granted, the amendments appearing by interlineation in the Information, and the cause proceeded to trial before a jury commencing on February 4, 1947 [R. 11]. At the conclusion of the Appellee's case, the Appellant moved for a judgment of acquittal, which motion was denied [R. 311-17]. This motion was renewed by the Appellant at the conclusion of the defense and again denied [R. 443-51].

After argument by counsel, the instructions of the Court were duly given and the cause submitted to the jury on February 11, 1947. On the same date the jury returned a verdict of guilty on all eight counts [R. 41, 641].

The Appellant renewed his motion for judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure and the same came on for hearing before the Court on February 18, 1947, and was denied [R. 43], whereupon the Court sentenced the Appellant to imprisonment for a period of three months in an institution of the jail type on each of the eight counts of the Informa-

tion, the sentences on all counts to run concurrently, and the execution of the jail sentence was suspended and the Appellant placed on probation for sixty days on each of the eight counts, the term of probation to begin and run concurrently. The Appellant was also fined the sum of $2,500.00 on each of the eight counts of the Information, making a total fine of $20,000.00 [R. 44, 45]. Notice of Appeal was filed on February 25, 1947 [R. 46-7].

Summary of the Facts.

The West Coast Supply Company, a partnership consisting of the Appellant's father, J. H. Ziegler, and two brothers, doing business in Los Angeles, California, as wholesalers of jams, jellies and allied products, had three separate sugar ration bank accounts in the Union Bank & Trust Company, Los Angeles, California, prior to and on July 1, 1946 [R. 333-35]. One account was called a wholesale account, another a processing account, and a third an industrial account [R. 64]. The Appellant, a lawyer in active practice in Los Angeles, California, from 1925 to 1943, devoted a considerable part of his time to the business of the West Coast Supply Company during the year 1943, principally as advisor to said Company in the dealings of that Company with the Office of Price Administration and other Governmental agencies [R. 333-35].

In February, 1944, the Appellant became a partner with his father, John H. Ziegler, in the John H. Ziegler Company, a partnership consisting of the Appellant and his father, at which time the latter company took over the manufacturing operations of the West Coast Supply Company and occupied premises next to the West Coast Supply Company on Long Beach Avenue, Los Angeles, California [R. 335-37]. On the signature card for the sugar ration accounts of the West Coast Supply Company with the Union Bank & Trust Company, the Appellant's name

appeared as one of those authorized to draw checks on these accounts [Government's Exhibit No. 2].

The John H. Ziegler Company was a separate business from the West Coast Supply Company, having separate bank accounts and separate employees [R. 337-38].

During May and June, 1946, while the debates were in progress in Congress relative to whether the O. P. A. should be extended for another year, Appellant discussed with various brokers the possibility of obtaining sugar in the event rationing of sugar should be terminated [R. 156, 345]. He was told that there was considerable sugar available—in fact, the warehouses were filled with it [R. 346]. In order to continue to operate his plant, sugar had to be obtained. During June, Appellant told certain brokers of sugar that he wished to be in a position to obtain sugar immediately, thinking that there would be a sudden rush to purchase if rationing should end [R. 346].

On June 29, 1946, the President vetoed the bill extending the O. P. A., and on the following day, Sunday, he went on the radio in a speech to the nation explaining his reasons for the veto. Appellant listened to that speech and concluded that, with the termination of the O. P. A., sugar was in a free market and no longer rationed [R. 349].

The following morning, Monday, July 1, 1946, Appellant immediately contacted the sugar brokers he had previously spoken to and arranged for the purchase of the sugar which brought about the instant case [R. 126, 165, 349]. The purchases were made by telephone. The brokers insisted upon Appellant supplying ration checks despite his contention that, since O. P. A. no longer existed, rationing was at an end. He gave four checks—one for 80,000 lbs, of sugar, Exhibit 3 [R. 209]; one for 660,000 lbs., Exhibit 4 [R. 183]; one for 30,000 lbs., Exhibit 5 [R. 232]; and one for 600,000 lbs., Exhibit 6 [R. 298], all of which were signed Paul J. Ziegler. After the checks

were either mailed or picked up by the respective brokers, someone inserted on each of the checks, just above Appellant's signature, "Paul J. Ziegler," the words "West Coast Supply Co." or "West Coast Supply Company" [R. 172-4, 187, 340-1-2].

Two of the brokers had called Appellant and asked him if he did not think West Coast Supply Company should be on the checks, to which he said "No" [R. 343]. One of the brokers, after first denying that the name West Coast Supply Company had been inserted, claimed that he told Appellant that they would have to insert the name and that Appellant said all right [R. 172].

The West Coast Supply Company's ration account at the Union Bank & Trust Company showed a balance of 34,717 pounds on June 30, 1946 [Exhibit 1; R. 79-80]. Exhibits 3, 4, 5 and 6, the checks, were charged to that account and treated as overdrafts.

On June 30, 1946, the President issued Executive Order 9745 which was not filed for publication in the Federal Register until July 1, 1946, at 10:32 a. m., Exhibit F [R. 350-2].

Executive Order 9745 provided for the continued administration, on an interim basis, of certain functions of the O. P. A. relating to rationing.

Appellant did not become acquainted with Executive Order 9745 until toward the end of July or the first of August, 1946, long after he had purchased the sugar involved [R. 352]. As a matter of fact, all of the sugar in question had been delivered prior to the time that Appellant's attorney located Executive Order 9745 and obtained a copy thereof. All of the sugar had been paid for and delivered by July 12, 1946, Exhibits 12 and 13 [R. 137, 354-5].

Specifications of Error.

I.

The District Court erred in admitting Government's Exhibits 3, 4, 5 and 6.

II.

The District Court erred in admitting testimony of the witness Loud respecting an alleged conversation with Appellant.

III.

The District Court erred in denying Appellant's motions for a judgment of acquittal on each and every count of the Information.

IV.

The District Court erred in permitting the Ass't. United States Attorney to call upon Appellant, while he was on the witness stand, to produce private papers and in compelling Appellant to produce as evidence his private papers, to wit: Government's Exhibits 40, 41, 42, 43 and 44.

V.

The District Court erred in refusing to admit the expert testimony of the witness, John B. Schnieder, relating to the available supply of sugar.

VI.

The District Court erred in giving Government's requested instruction 8.

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The District Court erred in refusing to give Defendant's requested instruction 39.

ARGUMENT.

SPECIFICATION OF ERROR I.

The District Court Erred in Admitting Government's Exhibits 3, 4, 5 and 6.

Exhibit No. 3 was the alleged ration check No. 148, dated July 1, 1946, to C & H Sugar Corp. for 80,000 pounds of sugar, drawn on the Union Bank & Trust Co. of Los Angeles, signed Paul J. Ziegler, and on the check above his name was typed in "West Coast Supply Company" [R. 209].

Exhibit No. 4 was the alleged ration check No. 146, dated July 1, 1946, to Holly Sugar Co. for 660,000 pounds of sugar, drawn on the Union Bank & Trust Co. of Los Angeles, signed Paul J. Ziegler, and on the check above his name was typed in "West Coast Supply Co." [R. 183].

Exhibit No. 5 was the alleged ration check No. 145, dated July 1, 1946, to Spreckles Sugar Co. for 30,000 pounds of sugar, drawn on the Union Bank & Trust Co. of Los Angeles, signed Paul J. Ziegler, and on the check above his name was printed in with pen "West Coast Supply Co." [R. 232].

Exhibit No. 6 was the alleged ration check No. 144, dated July 1, 1946, to Union Sugar Co. for 600,000 pounds of sugar, drawn on the Union Bank & Trust Co. of Los Angeles, signed Paul J. Ziegler, and on the check above his name was typed in "West Coast Supply Company" [R. 298].

The error complained of concerning these four Exhibits is treated under the one specification of error because they all raise similar questions of law.

The following occurred in raising objection to the admission in evidence of Exhibit 3 [R. 207-8]:

> "Mr. Strong: At this time, your Honor, I offer in evidence Government's Exhibit 3 for identification which is the check.

Mr. Carr: I object to it on the ground, if the court please, no proper foundation has been laid, no knowledge, no evidence of any knowledge on the part of the West Coast Supply Company, no evidence as to who put on the printing 'West Coast Supply Company,' and it is inadmissible against either Paul Ziegler or the West Coast Supply Company until connected up; that the check indicates or at least has on the face of it a suspicion of alteration.

I object to it on the ground that the information does not state an offense and upon the further ground that the partnership cannot be guilty of an offense and, thereby, it is not admissible.

The Court: Will counsel point out the alteration to which he directs the court's attention?

Mr. Carr: I am contending that 'West Coast Supply Company' in typing, that there is no foundation for it, your Honor, and from the evidence heretofore placed in the record, plus the statement of counsel at the beginning of the trial that there was something questionable about the checks, and as far as the signature is concerned, I am basing my objection on that ground.

The Court: The check will be admitted against Paul J. Ziegler. It will not be admitted as evidence against the West Coast Supply Company" [R. 207-8].

The following occurred in raising objection to the admission in evidence of Exhibit 4 [R. 182].

"Mr. Carr: I want to object to it on all grounds that I have heretofore set forth. In addition to the other grounds I want to add that a partnership cannot be guilty of a criminal offense and furthermore that there has been an alteration of the check; that it is not a ration document within those various sections that I have heretofore pointed out to your Honor and has not been shown to be any authority whatso-

ever for the signature or name 'West Coast Supply Co.' to be on the check."

The following occurred in raising objection to the admission in evidence of Exhibit 5 [R. 231].

"Mr. Carr: I am objecting to it on many and varied grounds I have already set forth and particularly with reference to both defendants. First it is a partnership, and there is no knowledge shown at all nor authority for the name to be on there. There is the suspicion of alteration so far as the defendant Ziegler, Paul Ziegler, is concerned; that it is inadmissible as against him because, first of all, the information does not state an offense against him and that the posture of the evidence at this time is such that no offense can be stated against either of the defendants under any of the counts in the information."

The following occurred in raising objection to the admission in evidence of Exhibit 6 [R. 149, 150].

"Mr. Strong: I offer this check in evidence, your Honor, as Government's Exhibit 6.

Mr. Carr: I object on the ground that it has been altered. The testimony shows it has been altered. It is not binding on either the West Coast Supply Company or on Paul J. Ziegler; for the further reason that under the ration order, Third Revised Ration Order No. 3, it is not a check issued under paragraph (15) of section 24.1, also under paragraph (5), section 24.1, and paragraph (9) of section 24.1, all because, your Honor, first of all, it is not a ration check; it is not on an account, not drawn by a depositor on a ration account. It is wholly immaterial, collateral to all of the issues in this case.

The Court: The check reads 'Ration Check—The United States of America—Office of Price Administration—Transfer to the sugar ration bank account of Union Sugar Co.—600,000 pounds of sugar.'

With reference to the alteration, Mr. Carr, will

you direct the court's attention to what you claim is an alteration?

Mr. Carr: I direct the court's attention to the fact that the witness has testified that the name 'West Coast Supply Company' did not appear there at the time he received the check. Someone after delivering the check has altered the check by adding to it 'West Coast Supply Company.'

The ration order specifically prevents the transfer of a check after it is altered. May I refer your Honor to section 15.7, Revised Ration Order No. 3, which reads as follows:

'No check which has been altered . . . mutilated or partially destroyed, or which contains an erasure, may be issued, transferred or deposited. A person who holds such a check . . .'

To-wit, this gentleman or his concern.

'. . . shall return it to the issuer with a request for a new check . . .'

And so on down to paragraph (h). I had better read the whole paragraph.

'(h) How altered and lost checks replaced. A depositor to whom an altered . . . mutilated or partially destroyed check issued by him is returned or who receives a request for the replacement . . . may issue a new check. If he does so . . .'

Then it goes on to say what he must do to cancel it.

Now, very specifically under everyone of those definitions and regulations the check could not be passed. It was an altered check. If you add a name to a check you alter it.

Mr. Carr: I want to reiterate all of the objections I have heretofore made and specifically add to that that this check, by the testimony of the Government's own witnesses, has shown to have been altered in that 'West Coast Supply Company' was written in after the check was issued" [R. 297].

At the outset, objection was made to the introduction of Exhibits 3, 4, 5 and 6 and was followed by extensive argument in support of the objection [R. 82-98].

Respecting Exhibit 3, Moseley, a witness for the Government, testified on direct examination that he had never seen the Exhibit prior to the time that he was called as a witness [R. 194]. The witness, Neff, called by the Government, testified on direct examination that he didn't recall this ration check in particular [R. 197].

Respecting Exhibit 4, the Government witness Barry, after testifying on direct examination that it appeared on its face the same when he received it from Appellant as it did at the time it was presented in court, finally admitted on cross-examination that he telephoned the Appellant because the name "West Coast Supply Co." did not appear on the check [R. 168, 171-2]. On redirect examination, Barry claimed that the name West Coast Supply Company was added because the Appellant said it would be all right [R. 172].

Catherine Barry, a Government witness, testified in answer to a question as to whether she was the one who typed in the words "West Coast Supply Co." "Well, it is a long time to remember back to say whether I did or did not. I have added the firm name to checks when they have been missing. I could have done it to this. I think I probably did. If I did, I asked the firm or at least somebody I thought was the firm whether I could add 'West Coast Supply Co.'" [R. 187].

Respecting Exhibit 5, Smith, a witness for the Government, testified that he was shown the check the day before he appeared on the witness stand and he couldn't remember if he had ever seen it [R. 222].

Respecting Exhibit 6, Leland, a witness for the Government, on direct examination testified that the check did not have "West Coast Supply Co." on it when he received it from Appellant and he did not know who inserted the words on the check [R. 132].

Writings which have been altered without the consent of a party hereto are not admissible in evidence against that party. In the case of *United States v. McCain* (D. C., E. D., Pa.), 1 F. (2d) 985, the Defendants were charged with the illegal possession and sale of whiskey and of maintaining a nuisance. One Austin, a witness for the prosecution, testified he had bought whiskey from the Defendants. On cross-examination, Defendants produced and showed to Austin an information, under oath sworn to by him before a Justice of the Peace, which was identified as an information accompanying a return of the Magistrate to the Court certified by the Magistrate. Upon cross-examination, the witness, Austin, admitted his signature to the information. The record which was produced and identified by the clerk of the Court, was offered in evidence by the Defendant to show a prior acquittal of the Defendants for the same offense and to impeach the witness, Austin, as to his whereabouts on the day of the offense. Upon objection by the District Attorney, the Court excluded this record upon two grounds, one of which is pertinent, namely, the ground that said record had been altered by inserting a different date thereon and in changing the jurat of the Justice of the Peace. In supporting its decision in this regard, the Court used the following language at page 986 of the opinion:

> "Upon the question of the exclusion of the altered affidavit and the return of the magistrate, the general

rule is that, where suspicion is raised as to the genuineness of an altered document, the party producing the document is bound to remove the suspicion by accounting for the alteration. Smith v. United States, 2 Wall. (69 U. S.) 219, 17 L. Ed. 788. The alteration was entirely apparent, and it was material because the paper was offered to prove a prior sworn admission by the witness Austin that on May 3, 1924, he purchased liquor of the defendants in Chester, thereby contradicting his testimony that he was not in Chester upon that date. When he was upon the witness stand, his attention was not called to that date, but merely to his signature, which he identified. Under these circumstances, I know of no rule of evidence which makes an apparent material alteration in a writing evidence, even if it is produced as a court record, unless the party producing it offers evidence to show that the alteration was made before the paper was signed. I am therefore not convinced that I was in error in excluding the evidence."

Where suspicion of alteration of an instrument is raised whether it be apparent on inspection, or is made so by extraneous evidence, the party producing the instrument is bound to remove the suspicion by accounting for the alteration. In the case of *Smith v. United States,* 2 Wall. 219, 17 L. Ed. 788, the case came before the Court on a Writ of Error to the Circuit Court of the United States for the Northern District of Illinois. It arose out of an action instituted by the United States on official bond of one Charles N. Pine, former U. S. Marshal. When the bond was offered in evidence, it appeared that the name

of one of the sureties had been erased. It appeared that the Appellant had never consented to the erasure. The document was admitted into evidence over objection of the Appellant. The Supreme Court held this ruling erroneous and that the document was inadmissible. At page 232 of the opinion the Court stated:

> "General rule is, that where any suspicion is raised as to the genuineness of an altered instrument, whether it be apparent upon inspection or is made so by extraneous evidence, the party producing the instrument and claiming under it is bound to remove the suspicion by accounting for the alteration. 1 Greenl. Ev., 564."

The second ground of objection advanced by Appellant, that Exhibits 3, 4, 5 and 6 were not sugar ration checks because they were not issued on a sugar ration account by a depositor, is treated fully under Specification of Error IV, namely, the error assigned for denial of motions for a judgment of acquittal, and for that reason are not set out at this place.

SPECIFICATION OF ERROR II.

The District Court Erred in Admitting Testimony of the Witness Loud Respecting an Alleged Conversation With Appellant.

The witness, Loud, was called by the Government during the case in chief and testified that he was employed by the Office of Price Administration [R. 287]. Loud testified that he had a conversation with Appellant in the first week or ten days of February, 1946. The following occurred [R. 288-89]:

"Q. What was the purpose of this discussion with Mr. Ziegler?

Mr. Carr: I am going to object to this. The date shows it is in February, 1946, several months before any alleged charge in the information, your Honor.

Any discussion with this defendant at that time would certainly have no bearing on the issue in this case.

The Court: Unless to show knowledge of the regulation, is all.

Mr. Strong: And willfulness, your Honor.

The Court: That is the only part. That must be established by the Government.

Mr. Carr: Well, if that is the point—

The Court: Yes, if it goes further than that, I shall entertain a motion to strike because it is antecedent to the offense charged.

Mr. Carr: I think counsel should state his purpose on a thing like that.

Mr. Strong: Shall I approach the bench, your Honor?

The Court: No, it is not necessary. Proceed.

(Question read by the reporter.)

The Witness: To ascertain the amount of sugar the West Coast Supply Company had received and was receiving at that time.

Q. By Mr. Strong: During this conversation with Paul Ziegler was there anything said about overdrawing of the sugar ration account of the West Coast Supply Company? A. Yes, sir.

Mr. Carr: I object to this as being outside the issues charged in the information.

The Court: Yes, I do not believe that part of the testimony is competent, unless the defendant's attention was called to some particular regulation with reference to the sugar ration. * * *

Mr. Carr: Well, now, did you rule on my objection, your Honor?

The Court: Yes, I sustained that. I suggested to counsel that if there are any matters that pertain to bringing home to the defendants knowledge as to the regulations at that time, sugar rationing, and so forth, that that is admissible; but that would be a different offense. I do not say there was. Maybe there was not any offense at all. There is not any evidence that there was an offense prior to July 1, 1946, alleged in this information.

However, any knowledge or statement made with reference to regulations to the defendant at that time will be permitted.

Mr. Strong: May I be heard further?

The Court: Yes.

Mr. Strong: I should like to offer it for a more extended purpose.

I think that the knowledge of the regulations is presumed since they are published in the Federal Register. My purpose is to show willfulness on the part of this defendant.

The Court: Yes, certainly. I have already stated that.

Mr. Strong: I am sorry. I thought your Honor was restricting it.

The Court: Oh, no.

Q. By Mr. Strong: Did the defendant, Paul Ziegler, make any statement or indicate in any way how he intended to obtain sugar after his ration account had been depleted?

Mr. Carr: Now, just a moment. That is assuming something that is not in evidence, saying that after the ration account was depleted; secondly, it is inquiring as to a time that is far antecedent to this information, and it certainly is going to work to the prejudice of this defendant if we get off into collateral issues. Then we will have to determine whether he violated some other regulation, your Honor.

The Court: Let me make it clear again.

Any knowledge brought to the deefndant with reference to the regulations, or anything that he said with reference to his attitude towards those regulations, is admissible. I am excluding any testimony at all with reference to an alleged overdraft or anything else that there might have been prior to July 1, 1946.

I think that that is very clear. The Government must show willfulness in this matter. All right.

Mr. Strong: What is your Honor's ruling?

The Court: Read it.

(Record read by the reporter.)

The Court: Does that clear it up?

Mr. Strong: I am sorry. I do not understand your Honor's ruling on the question because it is my purpose to show willfulness by language of the defendant at that time.

The Court: I said you could. Now, I shall keep repeating it, Mr. Strong, if you want me to.

Read it again to Mr. Strong.

(Record read by the reporter.)

The Court: Now, that is the statement: the Government must show willulness. That is what you asked me, and I repeat it again:

Any evidence you have of willfulness will be admitted" [R. 289-91].

"Q. By Mr. Strong: Did the defendant Paul Ziegler make any statement or indicate in any way how, if in any manner, he intended to obtain sugar in the event that his account was depleted?

Mr. Carr: Well, now, that certainly is objected to upon the basis it is based on a contingency. There is no foundation showing any contingency existed. It is prior to the time of the information.

The Court: Give the conversation between yourself and Paul Ziegler" [R. 292].

"The Witness: Well, Mr. Ziegler informed us that he felt that the sugar rationing was going off and that he was going to get sugar one way or the other, and his allotment period in January was like other allotment periods: he was short of sugar, and inasmuch as the meat rationing and gasoline, processed foods had gone off and no accounting was ever made of the filling station people or the grccers or the butchers as to how many points they had left or if it equaled their inventory, he felt that the same would happen to sugar. And he was going to get it one way or the other.

We informed him that sugar rationing was not off and that anything he did contrary to the regulations would not be legal.

> He replied that he was not going to be caught short and he was going to build up his inventory in case the sugar rationing went off, and he was going to be supplied with as much as he could possibly get" [R. 293].

If such a conversation occurred, as related by Loud, it appears that Appellant, at the time of the conversation, expressed a design or plan to obtain sugar. Prior to the introduction of this conversation, the prosecuting attorney had stated that it was introduced to show "willfulness." In the first place, it would appear that the conversation was actually irrelevant, and, secondly, it was highly prejudicial to Appellant as an attempt to show willfulness.

Defendants' statements of design or plan are often admitted in evidence by courts as circumstantial evidence that the defendant later committed the act specified in the design. Thus, Appellant's statement that he planned or designed to get sugar would be relevant circumstantial evidence that he later did try to obtain sugar.

However, the conversation between Loud and Appellant was not introduced to prove a subsequent act of obtaining sugar. Instead it was introduced to prove a *state of mind* alleged to exist at a later time when Appellant attempted to obtain sugar. Obviously, a statement of a plan to do a particular act, as get sugar, is irrelevant in proving the state of mind which existed at a later date when the attempt to get the sugar was consummated.

Although there is nothing in the alleged conversation between Loud and Appellant which can be definitely placed in the category of a plan or design to obtain sugar illegally, the jury would undoubtedly draw the inference that it did indicate a plan to obtain sugar illegally. As a matter of fact, from a logical standpoints, Loud, as special agent for the Office of Price Administration, probably would have been the last person to whom Appellant would have communicated a desire to obtain sugar illegally.

Thus, from a statement of intent to obtain sugar (without indicating the time or method), one cannot logically reach the conclusion that at a later date an intention existed to obtain sugar illegally or under different circumstances. This distinction, which is extremely important, was very succinctly stated by Wigmore in his treatise on Evidence, as follows:

Wigmore on Evidence, 3d Ed., §103 (3):

> "(3) *Design or Intention, distinguished from Intent.* The probative feature of an intention or design is its direction forward to the accomplishment of a purpose by action. That is why it is relevant to show the later doing of the act. This is a different thing from intent, in the legal sense, *i. e.,* the state of mind which accompanies an act and imparts to it a criminal or innocent quality. The two things are as different as the design with which a man buys a good cigar and his state of mind later when he is smoking it. His plan is, when buying, to smoke it; later, when his design is being fulfilled, his smoking is accompanied by sentiments of comfort and self-satisfaction. But his design may be frustrated and yet the accompanying sentiments may be experienced; as, if he loses the cigar and a friend gives him another. Or his design may be carried out, but the sentiments not be experienced; as, if the cigar turns out to be a poor one. So, too, a person may design to write a document and this design is relevant to show that he did later write it; but his intent, while writing it, to make false representations depends on different considerations. Again, a person may design to take another's property, and this design is relevant to show the subsequent taking; but whether the taking was under a claim of right or with felonious intent involves a different mental state."

A case analogous to the instant situation, and one which applies the foregoing principle, is *Stevenson v. U. S.* (5 Cir.), 86 Fed. 106. There, defendant was charged with murder for having killed a deputy marshal. Evidence was admitted as to the declaration of the defendant made three months prior to the homicide that he "intended to kill the next deputy marshal that arrested him." The Court held that the evidence was improperly admitted, pointing out on page 110:

> "The evidence of Mrs. Joe Paul with regard to the declarations of the defendant made some three months prior to the homicide was improperly admitted. It was too remote and general to have any legitimate bearing on the issues to be tried. The case does not show, nor even tend to show, that the deceased, Joe Gaines, acted as a deputy marshal, or that he was known to the plaintiff in error at any time as a deputy marshal, but rather tends to show—and that was the view of the trial judge—that Joe Gaines, in attempting to arrest the defendant prior to the homicide and afterwards at the homicide, was acting as a constable, and not as a deputy marshal."

See also:

Bird v. U. S., 180 U. S. 356, 45 L. Ed. 570.

The prosecuting attorney, in his closing argument, presented the jury with the inference that the intention expressed by the Appellant in the conversation with Loud was to obtain sugar illegally, a state of mind on the part of the Appellant which was not borne out by the actual testimony. This inference, drawn from irrelevant evidence, was highly prejudicial to Appellant and it could hardly be denied that the jury would be swayed by such evidence.

The prejudicial effect of Loud's testimony became more pronounced by the argument of the prosecutor. In his opening argument he said:

> "Then you will remember Mr. Loud of the Office of Price Administration testified here something to the effect that Mr. Ziegler was up there on some matter and that Mr. Ziegler indicated to him that he was going to get sugar.
>
> Mr. Ziegler said on the stand, No, he never said that.
>
> But the fact of what he was doing completely belies his own statement because it is exactly what he was doing all the time. He was trying to get sugar, and that is what he was after all the time: to get sugar. That is why he issued these four pieces of paper: to get sugar, not to just pass documents from one hand to another" [R. 542-43].

In his closing argument the prosecutor said:

> "As a matter of fact, in this case we have much more convincing proof that it was done because the thing that Mr. Loud said Mr. Ziegler had told him he was going to do, to try to get sugar any way he could, isn't that exactly what he did in this case? Isn't that exactly what he was trying to do throughout May and June, 1946? And isn't that precisely what he ultimately did when he issued these documents over which there is a dispute, apparently, as to whether they are pieces of paper or checks?
>
> Why did he issue these documents if it was not to get sugar? Was he not trying to get sugar all the time? Wasn't he trying to get it any way he could? And isn't that exactly what Mr. Loud said the defendant told him he was going to do?

> I don't see any reason why it should be assumed that Mr. Loud is not telling the truth in view of all those circumstances and in view of the fact that Mr. Loud is a person who has no direct interest in this case" [R. 598-99].

The insidious effect of this argument becomes apparent. Although this evidence was not introduced to prove the fact that the Appellant had obtained sugar, but, according to the prosecutor, for the purpose of showing willfulness, here now the prosecutor is arguing that Appellant had told Loud that he was going to get sugar and that Appellant did just exactly that. The prosecutor also argued that Appellant was trying to get sugar throughout May and June, 1946, which is wholly contrary to the evidence. The only testimony concerning negotiation for sugar was that of Appellant, and it was unrefuted that he talked to the various brokers during May and June and had told them that he wanted to be ready to acquire sugar should O. P. A. be terminated [R. 156, 345].

In the first place, the statement attributed to Appellant that "he was going to get sugar one way or the other" leaves entirely too much for interpretation. The prosecutor's approach was that this statement, made approximately five months prior to the alleged offense, meant that Appellant was going to obtain sugar illegally. The alleged statement of Appellant is subject to various interpretations and the most reasonable interpretation is not necessarily the one that it disclosed any desire to obtain sugar illegally.

Even assuming that the statement attributed to Appellant by Loud contained an inference of an illegal desire

to obtain sugar, its relevancy is relatively remote. The process of inference from a mental condition at one time, unrelated to any particular act, to a mental condition at another time under different circumstances (the changed situation including the Presidential veto of the O. P. A.) with respect to a particular act, is extremely remote. Here the argument is from a mental condition supposedly once existing to its subsequent prolongation. The peculiar opportunity for error here is that the alleged prior existing emotion may have been brought to an end by a change in the facts (which was the situation in the instant case) before the time in issue, and the subsequent existing emotion at the time of the alleged criminal act may have been first produced at the time of the alleged offenses, namely, July 1.

The conversation with Loud from which the Government desires to infer a mental condition on the part of the Appellant occurred in February, many months before the acts in question and before the all-important veto of the O. P. A. by the President. If this conversation was relevant at all, and that is challenged, to prove mental condition, its revelancy certainly was so remote as to be completely outweighed by the undue prejudice which it created in the minds of the jury against Appellant.

The disadvantageous and prejudicial effect of such testimony as that produced by Loud falls within the two descriptions of Professor Wigmore, Vol. VI, 3d Ed., Sec. 1864 (a), p. 490:

> "If the use of certain evidential material tends to produce undue confusion in the minds of the tribunal —*i.e.*, the jurors—by diverting their attention from the real issue and fixing it upon a trivial or minor

matter, or by making the controversy so intricate that the disentanglement of it becomes difficult, the evidence tends to the suppression of the truth and not to its discovery; and there is good ground for excluding such evidence, unless it is so intimately connected with the main issue that its consideration is inevitable.

"(b) So also, if certain evidential material, having a legitimate probative value, tends nevertheless to produce also, over and above its legitimate effect, an unfair prejudice to the opponent, or by virtue of the personality of the witness tends to receive an excessive weight in the minds of the tribunal, there is good ground for excluding such evidence, unless it is indispensable for its legitimate purpose."

The testimony of the witness Loud and the references thereto by the prosecutor in his argument made it impossible for the jury to give appropriate and proper consideration to Appellant's defense that he honestly believed that the O. P. A. had terminated on June 30 and that on July 1, the date of the alleged offense, he was entitled to purchase sugar in a free market. In other words, the very foundation of Appellant's defense was so completely confused as to leave no hope for a verdict of the jury based solely on the evidence in the case.

SPECIFICATION OF ERROR III.

The District Court Erred in Denying Appellant's Motions for a Judgment of Acquittal on Each and Every Count of the Information.

At the conclusion of the Government's case in chief, the following occurred:

> "Mr. Carr: If the court please, there are various matters I want to take up.
>
> First I want to move under Rule 29 of the Rules of Criminal Procedure for the court to order an entry of judgment of acquittal on each and every count of the information as to both defendants, the West Coast Supply Company and Paul J. Ziegler.
>
> Perhaps the order in which I take these up may save some time, your Honor.
>
> The Court: How much time would you like, Mr. Carr? * * *
>
> The Court: Proceed.
>
> Mr. Carr: Now, first I want to take up the information itself, your Honor, and the grounds of that motion are simply this:
>
> First, under Rule 12(b)(2), the Rules of Criminal Procedure, provides that the court may at any time take notice of and dispose of the failure or any or every count that charges an offense.
>
> The second proposition is that the evidence is insufficient to sustain a conviction on any of the counts against either one of these defendants" [R. 311, 312].

Thereafter, beginning on p. 312 of the record and continuing to p. 328, is set forth the argument in support of the motion.

At the conclusion of the case of Appellant, the motion for judgment of acquittal was renewed [R. 425].

At the conclusion of the entire case, the following occurred:

"Mr. Carr: Yes. Your Honor's ruling is that the judgment of acquittal is now ordered entered in the case of the West Coast Supply Company on each and every count?

The Court: That is correct.

Mr. Carr: So then I shall address myself to the matter of Paul J. Ziegler.

Now, if the court please, I want, even if I have to presume a little upon the court's time, to very vigorously and as strongly as I can direct the court's attention to the proposition to which I am going to address myself.

First I will move that the court enter a judgment of acquittal on each and every count of the information, to-wit, eight counts, insofar as the remaining defendant, Paul J. Ziegler, is concerned, based upon the grounds:

First, that the information does not state an offense;

Secondly, that there has been a complete variance of the proof with the allegations of each and every count of the information;

Third, that the evidence is wholly insufficient to support a verdict of guilty on any of the eight counts of the information" [R. 443].

At the outset, it would appear that Counts Three and Four should have been summarily disposed of on the motion for the reason that, at all times mentioned in Counts Three and Four, there was an actual balance in the accounts of the West Coast Supply Company in the amount of 34,717 pounds [Exhibit 1]. The Government, however, contended that the check in the amount of 600,000 pounds [Exhibit 6], drawn to the Union Sugar Co., had

arrived at the bank first and thereby created an overdraft. Under this theory, a larger check than the balance arriving ahead of another check would supposedly deplete the account although a demand would be made upon the depositor for ration credits, and, if not supplied, the entire amount of the check first arriving would be entered as an overdraft. An analogous situation is presented where a depositor has in an account $10,000 and on the same day issues two checks—one for $12,000 and one for $5,000. In the event the bank refused payment of the $12,000 check, it certainly would not be contended that the bank would reject payment of the $5,000 check. It seems basically sound to assert, assuming Appellant had actually been a depositor and had issued a check on the account, that he would be entitled to absorb the entire 34,717 pounds before being charged with an overdraft.

The second ground urged in support of the motion for a judgment of acquittal was that there had been a fatal variance between the charges in each of the counts and the proof. In Counts One, Three, Five and Seven, it was clearly intended to charge an overdraft on the ration account of the West Coast Supply Company. Specifically, it was charged as to each check that defendants did wilfully issue and cause to be issued a sugar ration check for an amount larger than the balance in the account on which it was drawn by issuing to the Union Sugar Co. a check, drawn by and on behalf of the West Coast Supply Company and Ziegler, when the West Coast Supply Company had a balance at the Union Bank & Trust Co. in its accounts insufficient to cover the amount of the check.

Section 15.7 (d) of Third Revised Ration Order No. 3, specifically provides:

> "(d) *Overdrafts prohibited.* No check may be issued for an amount larger than the balance in the account on which it is drawn less the amount of outstanding checks drawn on that account."

Under the foregoing quoted section, the proof required to sustain a violation would be that a ration check was issued for an amount larger than the balance in the ration account on which it was drawn.

Section 24.1 (c) (5) of Third Revised Ration Order No. 3 defines check as:

> " 'Check' means a sugar ration check, in the form prescribed by the Office of Price Administration, drawn by a depositor against his account and made payable to the account of a named person."

The record contains no evidence whatsoever that Appellant was a depositor—in fact, the evidence conclusively shows that he was not.

Section 24.1 (c) (9) defines depositor as:

> " 'Depositor' means a person who has a ration bank account. * * *"

Section 24.1 (c) (1) defines account as:

> " 'Account' means a sugar ration bank account carried by a bank, in which the bank keeps a record of deposits of stamps, coupons, and checks and of transfers of sugar ration credits."

There was no evidence that Appellant had, at any of the times mentioned in any of the Counts of the Information, a ration bank account. On the contrary, the evidence definitely disclosed that he had no such account, nor was he a depositor.

Section 24.1 (c) (15) defines issue as:

> " 'Issue' when used with respect to a check, means the delivery of a completed check to the person to whose account the check is made payable."

The evidence produced by the Government discloses that Exhibits 3, 4, 5 and 6 were not, in fact, completed, but, on the contrary, were altered after they were delivered by Appellant to the various brokers.

It should be noted that Section 15.7 (f) of Revised Ration Order No. 3 states:

> "No check which has been altered, * * * may be issued, * * *."

The District Court entered a judgment of acquittal as to the West Coast Supply Company, and that Company had the ration account, not the Appellant. If the checks in question were not issued by or on behalf of the West Coast Supply Company, then certainly they were not ration checks on the account of the West Coast Supply Company, and, if they were not checks on that account, they were, in fact, nothing but pieces of worthless paper in so far as Section 15.7 (d) is concerned.

In so far as Counts One, Three, Five and Seven are concerned, the Government charged that the West Coast Supply Company and Appellant had issued ration checks against the account of the West Coast Supply Company and that those checks resulted in overdrafts. The proof, however, was a complete variance with the charge and disclosed that actually Exhibits 3, 4, 5 and 6, while being signed by Appellant, were not drawn on the account of the West Coast Supply Company either by that Company or on its behalf. Otherwise the lower court, upon its stated theory that a partnership might be criminally liable, would have refused to enter a judgment of acquittal.

The situation here would be no different from one where it was charged that a check on a bank account was an overdraft and it developed that the name in which the account was carried was placed on the check after it was issued and without the knowledge or consent of the depositor. It is unlikely that it would be contended that such a transaction constitutes an overdraft no matter how many other offenses might be involved.

It is contended by Appellant that there was a material variance between the charges in Counts Two, Four, Six

and Eight and the proof. In each of the counts it was charged that Appellant and West Coast Supply Company unlawfully received sugar in exchange for a ration check drawn by and on behalf of Appellant and West Coast Supply Company on the Union Bank & Trust Co. and "issued by the defendants" when they knew that the rationed documents were not validly issued because the West Coast Supply Company did not have a ration bank account with sufficient balance to cover the respective checks. There was a material variance between these charges and the proof in two particulars— namely, the Government proved that the West Coast Supply Company actually received the sugar (not Appellant), and it completely failed to prove that the ration checks were issued on the ration account of the West Coast Supply Company.

The Government introduced in evidence Exhibits 12 through 21, both inclusive, to establish that the sugar was actually delivered to the West Coast Supply Company.

Exhibit 12 consisted of invoices to the West Coast Supply Company for sugar [R. 134]. Exhibit 13 consisted of freight bills showing the transfer of sugar to the West Coast Supply Company [R. 135]. Exhibit 14 consisted of delivery receipts showing delivery of sugar to the same Company [R. 135]. Exhibit 15 consisted of four documents showing shipment and delivery of sugar to West Coast Supply Company [R. 159]. Exhibits 16 through 20, both inclusive, were original and photostatic copies of documents showing the transfer of sugar to the West Coast Supply Company [R. 161]. The witness, Robert A. Russell, called by the Government, testified that he was employed by the West Coast Supply Company. He identified his signature on the above mentioned Exhibits [R. 257 *et seq.*]. All Exhibits introduced by the Government relating to delivery of the sugar show delivery to West Coast Supply Company. The only evidence of delivery to any one other than West Coast Supply Com-

pany was the one statement by the witness Russell. When testifying concerning Exhibit 15-A, he stated that that particular sugar he received in the entrance of the warehouse of the John H. Ziegler Co. [R. 255]. Appellant did attempt to testify on direct examination that the John H. Ziegler Co. paid for the sugar, but counsel for the Government objected and the Court sustained the objection on the ground that the checks would be the best evidence. Thereafter Government counsel demanded the checks of Appellant while he was on the stand in his behalf and they were introduced in evidence over the objection of Appellant [R. 384 *et seq.*].

In the case of *Berger v. U. S.*, 295 U. S. 78-89, 79 L. Ed. 1314, the rule for the determination of whether there is a variance in the proof is set forth at p. 1318.

> "The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense."

In *Neal v. U. S.* (8 Cir.) 102 F. (2d) 643, the indictment informed the defendant that the Government would prove that the $5,903 was a part of that stolen after August 24, 1937, and not that it might be a part of that taken some time during the preceding seven years. The Court reversed the case holding that the variance was material pointing out there would have to have been a different defense if the allegation had been that the money was taken afterwards.

So, in the instant case, Appellant was charged in the odd-numbered counts with an overdraft and came to court prepared to defend on those charges. Counsel for the Government seemed to take the position that, if the facts

developed any offense under Third Revised Ration Order No. 3 or General Ration Order No. 8, Appellant should be found guilty. No principle of criminal law is more firmly established than the principle that one cannot be convicted of an offense not charged in the Information or the Indictment.

Malaga v. U. S. (1 Cir.), 57 F. (2d) 822. Furthermore, it is fundamental that material parts of which constitute the offense must be stated in the indictment or information and they must be proved by the evidence.

Mathews v. U. S. (8 Cir.), 15 F. (2d) 139, 142-3;
U. S. v. Byers (2 Cir.), 73 F. (2d) 419.

Respecting the even-numbered counts, Appellant came to court prepared to meet the charge that he had received the sugar alleged in Counts Two, Four, Six and Eight, for checks on the account of the West Coast Supply Company as set forth therein. At the end of the Government's case, when the motion for the judgment of acquittal was first made on each count, there was no evidence whatsoever that appellant had received any sugar. On the contrary, all of the evidence conclusively showed that it was received by the West Coast Supply Company. The Court, at that particular time, refused to grant the motion not only as to Appellant but as to the West Coast Supply Company. At the end of the entire case, the Court granted the motion as to West Coast Supply Company and the jury returned a verdict on the even-numbered counts—that is, the receiving of the sugar, against Appellant. The evidence also disclosed that the alleged ration checks, Exhibits 3, 4, 5 and 6, were, in fact, not issued on the account of the West Coast Supply Company as charged in the even-numbered counts. It, therefore, appeared at the end of the Government's case and at the conclusion of the case for the defense that there had been a material variance in the particulars as heretofore set out.

Another one of the grounds urged in support of the motion for judgment of acquittal was that the quota base provisions of Third Revised Ration Order No. 3 are made dependent upon historical use in administering the sugar rationing program, and that such restrictions are expressly prohibited by the War Mobilization and Reconversion Act of 1944 (50 U. S. C. A., App., Sec. 1651 *et seq.*) and are invalid [R. 317-8].

The evidence discloses that the John H. Ziegler Co. was an industrial user [R. 362]. However, the Company did not come into existence until 1944 [R. 337]. The business was that of manufacturing jams, jellies, doughnut flour, flavors, extracts and glazed fruits [R. 333]. The Company employed in June and July of 1946 approximately 20 people [R. 335].

Any manufacturer (industrial user) who began operation of business after 1941 encountered extreme difficulty in obtaining sugar by reason of not having a base period in that year. Under Third Revised Ration Order No. 3, such a manufacturer's quota was predicated upon a historical basis or otherwise it was dependent upon the concern's existence at a given time.

The War Mobilization and Reconversion Act of 1944, Sec. 1658 (b) provides:

> "Such production for nonwar use shall be permitted regardless * * *, and shall not be made dependent upon the existence of a concern or the functioning of a concern in a given field of activity at a given time;"

Section 1659, U. S. C. A., Title 50, App. provides:

> "(a) Whenever the expansion, resumption, or initiation of production for nonwar use is authorized, on a restricted basis, by any executive agency having control over manpower, production, or materials, the restrictions imposed shall not be such as to prevent any small plant capable and desirous of participating in such expansion, resumption, or initiation of pro-

duction for nonwar use from so participating in such production.

"(b) Whenever such executive agency allocates available materials for the production of any item or group of items for nonwar use, it shall make available a percentage of such materials for the exclusive use by small plants for the production of such item or group of items. Such percentage shall be determined by the head of such agency after giving full consideration to the claims presented by the chairman of the board of directors of the Smaller War Plants Corporation and shall be fair and equitable.

"(c) * * * For the purposes of this title (sections 1656-1660 of this Appendix), a small plant means any small business concern engaged primarily in production or manufacturing either employing two hundred and fifty wage earners or less, or coming within such other categories as may be established by the head of such executive agency in consultation with the chairman of the board of directors of the Smaller War Plants Corporation. * * *"

Appellant, as an industrial user, was entitled to an allotment which was just, fair and reasonable because he was a small plant capable and desirous of participating in expansion or initiation of production for nonwar use. The program denying this, namely, Third Revised Ration Order No. 3, was, therefore, invalid as to him as was held in *Fleming v. Moberly Milk Products Co.* (D. C., Cir.), 160 F. (2d) 259. The lower court (69 F. Supp. 776) in its opinion (p. 777) stated:

"The Congress saw fit to encourage small enterprises and new plants and to protect same in the expansion and initiation of production for non-war use. To further such Congressional purpose statutory safeguards were set up to protect small plants and new concerns from discriminatory use of historical use bases for any purpose in ration orders."

SPECIFICATION OF ERROR IV.

The District Court Erred in Permitting the Ass't. United States Attorney to Call Upon Appellant, While He Was on the Witness Stand, to Produce Private Papers and in Compelling Appellant to Produce as Evidence His Private Papers, To Wit: Government's Exhibits 40, 41, 42, 43 and 44.

Appellant took the stand and testified in his own behalf [R. 333]. During the time that Appellant was under cross examination by Government's counsel, the permissible limits of such an examination were overstepped constantly and eventually reached a histrionic climax with a demand upon Appellant, while under cross examination, to produce his private papers.

The situation developed in the following way. At the close of the Government's case, all of the testimony introduced by the Government proved that the sugar involved was delivered to the West Coast Supply Company. As heretofore pointed out, there was insufficient evidence during the case in chief to prove that Appellant was a member of the partnership, West Coast Supply Company, or that he had received any of the sugar mentioned in any of the Counts. Despite this, as heretofore mentioned, the Court denied the motion for a judgment of acquittal both as to Appellant and the West Coast Supply Company as to each and every Count.

All of the sugar involved had actually been delivered by July 12, 1946 [R. 354]. However, the Government introduced various Exhibits dated after July 12, 1946, which tended to show the transportation of the sugar from warehouses where it was being held for the West Coast Supply Company to the plant of the West Coast Supply Company. Count Two charged receipt of sugar from about July 3, 1946, to about August 17, 1946, and Count Six from about July 1, 1946, to about August 30, 1946.

It became material to establish when the actual delivery of the sugar took place. Thereupon, during his direct examination, Appellant identified and introduced in evidence Exhibit F, which was a check from the John H. Ziegler Co. to the Union Sugar Company in payment for 6,000 sacks of sugar [R. 355-6].

The following occurred:

"Q. By Mr. Strong: Thank you, sir. I don't see here any of the other checks used in payment for the transactions involving the 30,000 pounds of sugar which was sold by the Spreckels Sugar Company in connection with which the piece of paper marked Government's Exhibit 5 was given, nor the check, money check, covering the other two transactions of 660,000 pounds and 80,000 pounds.

I ask you whether the cash checks were in the same form as this Defendants' Exhibit F? A. If it would be of any help to you, Mr. Strong, the checks are here in court.

Mr. Strong: May I see them?

Mr. Carr: Just a moment. I will decide that. I am the counsel in the case.

Mr. Strong: I am sorry. May I see them?

Mr. Carr: No.

Mr. Strong: I call upon the defendant for the production of the three checks.

Mr. Carr: Now, I cite that as error to call upon the defendant upon the stand to produce any evidence in this case, and I ask your Honor to instruct the jury that he is not compelled to produce any evidence, except that which he desires to produce.

The Court: In other words, on cross examination?

Mr. Carr: No, your Honor, he is not compelled to produce anything.

The Court: Oh, yes. When a witness is on the

stand, Mr. Carr, the Government is entitled to cross examine him on any matters that pertain to the issue.

Mr. Carr: Does your Honor order me to produce the checks?

The Court: Yes.

Mr. Carr: I will produce them, but I want it understood it is over my objection.

The Court: That is right. Let the record so show.

Mr. Carr: I might add to that, on the further ground that it might tend to incriminate or bring other and collateral offenses into this case which are not charged in the information.

The Court: That is personal privilege.

I instruct the witness at this time, in view of the statement of counsel, that if you feel, Mr. Ziegler, that the production of these instruments might tend —not 'do' at all—might tend to incriminate you, you have the right to refuse to answer and the court will deny the request of the Government to produce the documents.

Mr. Strong: I think it will save time if I withdraw the request, your Honor. I would rather withdraw it.

Mr. Carr: Then I am going to move at this time that the court instruct the jury to disregard the whole incident. Counsel for the Government should not have asked for them if he did not want them.

This business of making a play of asking for them and very touchingly giving up the request I don't think is a proper approach.

Mr. Strong: May I have the checks, your Honor?

The Court: Produce the checks.

(Brief pause in the proceedings.)

Mr. Carr: Do you find them?

The Witness: Yes.

Mr. Carr: May I pick up the rest of those?

The Court: Yes.

Mr. Carr: Just take the checks off.

(Brief pause in the proceedings.)

Q. By Mr. Strong: Do you now have the checks, Mr. Ziegler A. Yes.

Q. May I see them? A. (Handing documents to counsel.)

Mr. Strong: May the record show that the witness is handing me the checks?

I should like to have them marked first before we say anything.

The Witness: All right.

Mr. Strong: May I have these checks marked for identification, each one a separate Government exhibit?

The Court: Look at the dates and try to get them in order by dates.

The Clerk: The first check will be Government's Exhibit No. 40 for identification, and that is dated July 5, 1946.

The next check is Government's Exhibit No. 41 for identification, and that is dated July 8th, 1946.

The next Government's Exhibit is No. 42 for identification, and that check is dated July 11, 1946.

The next check is Government's Exhibit No. 43, and that is dated July 11, 1946.

And the next check is Government's Exhibit No. 44 for identification, and that is dated July 11, 1946" [R. 381-4].

Mr. Strong: At this time, your Honor, I should like to offer in evidence Government's Exhibits 40, 41, 42, 43 and 44 which are the money checks.

Mr. Carr: I am going to object to those. I have heretofore objected on the ground that the defendant was called upon to produce them when he was not

required to, and they were produced under order of the court over the objection of counsel for the defendant.

The Court: Overruled. In evidence.

The Clerk: Government's Exhibits 40 to 44, inclusive, in evidence" [R. 394].

Exhibits 40 through 44, both inclusive, were checks drawn by the John H. Ziegler Company, signed by Appellant, Paul J. Ziegler, and were in payment for the sugar mentioned in the various Counts of the Information [R. 395 *et seq.*].

Appellant was compelled to produce these five checks which tended to prove that the John H. Ziegler Company, a Company in which he was a partner, had paid for the sugar referred to in Counts THREE, FOUR, FIVE, SIX, SEVEN and EIGHT. Appellant's signature was affixed to the checks. Thus, during cross-examination, he was, by order of the Court, compelled to produce evidence against himself. It should be kept in mind that, up to this point, the evidence produced by the Government tended to prove that the sugar in question had been purchased by and delivered to the West Coast Supply Company.

The lower court appeared to think that, because Appellant had elected to introduce one of his checks, namely, Defendants' Exhibit F, he was thereby subject on order to produce the remainder of his checks which were private papers. Apparently the Court's ruling was based upon the theory that any matter opened on direct examination would force Appellant to produce his private papers concerning such matter upon demand by the Government. It is well settled, of course, that a witness, including a defendant who takes the stand in his own behalf, may be cross-examined on all matters which he opens in his direct examination. It is also as well settled that, in the federal courts, the cross-examination of a witness is limited to matters embraced in his examination in chief. *Alpin v. U. S.*, 9 Cir., 41 F. (2d) 495.

The rule is the same in civil or criminal cases. *Tucker v. U. S.*, 8 Cir., 5 F. (2d) 818.

In a criminal case, the defendant waives his privilege of silence upon the subjects relative to which he testifies, but upon no other. *Harrold v. Territory of Oklahoma*, 8 Cir., 169 Fed. 47, 51.

The order to produce private papers is in no way involved in the principles of law above set forth. The question is whether or not the defendant has been compelled, contrary to his constitutional privilege under the Fifth Amendment of the Constitution, namely, that he shall not be compelled in any criminal case to be a witness against himself, and, under the Fourth Amendment, his immunity to unreasonable search and seizure. In *Boyd v. U. S.*, 116 U. S. 616, the court held that there could be no compulsory production of a man's private papers to establish a criminal charge against him because of the Fourth and Fifth Amendments.

The case of *McKnight v. United States* (6 Cir.), 115 Fed. 972, is the leading case concerning the right of a District Attorney to call upon a defendant to produce documents. The case was decided in 1902 and has been followed since that time by many other courts. A Government witness on the prosecution's case testified on direct examination in a criminal case that the original agreement between him and defendant was last seen by him in the defendant's possession. The district attorney then offered in evidence a copy of this agreement. Objection was made by defendant's counsel. After further evidence that the witness saw the original agreement in the hands of the defendant, the district attorney asked the witness to read the copy in evidence. The court stated: "Now, if the district attorney chooses, he can demand the production of that paper." The district attorney did so, directing his demand to the defendant. Defendant's counsel objected to the demand. The court then stated: "Is

it produced, or is it desired to produce it, by the defendant?" The defendant's counsel then denied the right of the district attorney to make the demand.

On appeal the following error was urged: That the court permitted the defendant to be called upon to produce the paper in open court upon trial before a jury.

In holding that this was a violation of his constitutional rights, the court stated at page 980:

> "As it would be beyond the power of the court to require the accused to criminate himself by the production of the paper as evidence against himself, secondary evidence is admissible to show its contents. As the introduction of secondary evidence of a writing in such instances is founded upon proof showing the original to be in the possession of the defendant, it will ordinarily be in his power to produce it, if he regards it for his interest to do so. The court, as we have seen, cannot compel a defendant in a criminal case to produce an incriminating writing. * * *
>
> "In the present case the accused, in the presence of the jury, was, by direction of the court, called upon to produce the document which it was alleged contained the corrupt agreement which was the basis of the note given by irresponsible persons for the funds of the bank by McKnight's direction. The production of such a paper would have been self-criminating to the defendant in the highest degree. It is true, the learned judge made no order requiring its production; but the accused, by the demand made upon him before a jury, after proof tending to show his possession of the document, was required either to produce it, deny or explain his want of possession of the writing, or by his very silence permit inferences to be drawn against him quite as prejudicial as positive testimony would be. Nor were the jury advised that the nonproduction of the writing afforded no ground for an inference of guilt. We think this pro-

cedure was an infraction of the constitutional rights of the accused, within the meaning of the fifth amendment to the constitution."

Lisansky v. U. S. (4 Cir.), 31 F. (2d) 846, 850:

"The books were shown to be in possession of the defendants; and, because of the provisions of the Fourth and Fifth Amendments, the court was without power to require their production at the trial. Boyd v. U. S., 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746. And it was not permissible for the government even to lay the foundation for the introduction of copies of the books, as in civil cases, by making demand for their production in open court, or by introducing in evidence notice of such demand. McKnight v. U. S. (C. C. A. 6th), 115 F. 972, 981. But evidence as to the contents of books and papers is not lost to the government because the defendant has them in his possession and their production cannot be ordered or the usual basis laid for the introduction of secondary evidence. In such cases, the rule is that, when they are traced to his possession, the government, without more ado, may offer secondary evidence of their contents."

See also:

O'Shea v. U. S. (6 Cir.), 93 F. (2d) 169;

Watlington v. U. S. (8 Cir.), 233 Fed. 247;

Savage v. U. S. (8 Cir.), 270 Fed. 14;

Eddington v. U. S. (8 Cir.), 24 F. (2d) 50;

U. S. v. Kempe (D. C. N. D. Ia.), 59 Fed. Supp. 905;

Heller v. U. S. (4 Cir.), 104 F. (2d) 446;

Hilliard v. U. S. (4 Cir.), 121 F. (2d) 992.

The only case which appears to question the rule is that of *U. S. v. Buckner* (2 Cir.), 108 F. (2d) 921. However, in that case the defendant's counsel produced the

documents upon the request of the prosecutor and without order of the court. Furthermore, the defendant made no objection.

If the cross-examination of a witness is restricted to what is opened in chief, and the rule is certainly not less stringent as to a defendant in a criminal case, then a contention that a defendant may waive his constitutional privilege against self-incrimination and the compulsory production of private papers finds no support in the decisions of the courts and wholly lacks persuasive quality. On many occasions, the attorneys for the government have, during the cross-examination of a government agent, strenuously objected to a request that the agent produce his notes upon the ground that such notes were confidential despite the fact that the witness had testified to matters after refreshing his recollection from his notes. The decisions generally hold that such objections may be sustained.

Upon what basis may the foregoing principle be justified and yet at the same time insistence be made that a defendant may be deprived of his constitutional rights under both the Fourth and Fifth Amendments because he has taken the witness stand in his own behalf, and, in fact, as in the instant case, has not so much as referred to the documents which were demanded of him?

The demand for the documents was made during a cross-examination in which the Appellant had been questioned about other possible offenses, had been warned in the presence of the jury both by the prosecutor and the court that he need not testify if his testimony might tend to incriminate him, and, in general, subjected to cross-examination not within permissible limits. Upon what theory the government will predicate such conduct is not known, for it appears that such a demand was in violation of the constitutional rights of the Appellant.

SPECIFICATION OF ERROR V.

The District Court Erred in Refusing to Admit the Expert Testimony of the Witness, John B. Schnieder, Relating to the Available Supply of Sugar.

The Appellant called as a witness John B. Schnieder, an economic consultant specializing in agriculture, and the following occurred:

> "Q. Now, I ask you to ascertain for me and for presentation to the jury and the court for the year 1946 from official documents—and you can specify what those documents are—the available supply of sugar for consumption in the United States in 1946?
>
> Mr. Strong: I object to that, your Honor. I don't think it makes the slightest bit of difference.
>
> The Court: I shall hear Mr. Carr on it.
>
> Mr. Carr: Well, my point is simply this, your Honor: that we are going to offer this testimony to show that on July 1, 1946, there was no emergency, to-wit, therefore, no authority for the rationing of sugar and that instead of there being a scarcity of sugar there was ample supply in the country and, therefore, no authority for the rationing program in so far as the Third Revised Ration Order No. 3 is concerned, and also in connection with our argument to do with reconversion. [R. 410-11.]
>
> The Court: * * *
>
> I am going to sustain the objection of the Government, and I am going to ask Mr. Carr in the absence of the jury to make an offer of proof because I regard this question new and very important. [R. 420.]
>
> Mr. Carr: And I am now just making the offer of proof as follows:
>
> That the requirements are based upon a 1935-39 average per capita consumption on 96.5 pounds of

refined sugar for a population of 139,028,300. That figure—

The Court: What is the per capita, Mr. Carr?

Mr. Carr: 139,028,300. That evidence would show that it was arrived at by a computation, taking the official statistics for 1946 but scaling it down just slightly to try to be absolutely accurate.

The requirements based on that 1935-39 average per capita of raw sugar was 7,173,860 tons. Reduced to refined sugar, it was 6,708,115 tons.

On a per capita percentage basis, the requirements of raw sugar were 103.2 pounds per person; on a refined basis, 96.5 pounds per person.

In 1946 the actual consumption of raw sugar was 5,645,913 pounds.

The refined actual consumption, that is, tons—and I am speaking with reference to short tons—was 5,276,554 tons; actual consumption per capita, raw, 81.2 pounds per person; actual consumption on a refined basis, 75.9 pounds per person.

We offer to prove that the evidence will show as to raw sugar not used of the total, which we will call a deficit, was 1,527,947 tons.

As refined sugar that would show that there was, in addition to actual consumption, or a deficit, 1,431,561 tons, as per capita there was 22 pounds of raw sugar which was not used, available but not used.

Of the refined sugar there was 20.6 pounds per capita on the same basis. That is the refined.

Now, the controlled coupon sugar allocated to other countries but controlled by the United States was 1,619,000 pounds—that is raw—and 1,513,084 pounds refined. That represents 23.3 per capita, that is, on a pound basis in raw sugar; and 21.8 pounds per person on a refined sugar basis.

Now, adding those figures that I have just read to the actual consumption, which was on raw sugar, 5,645,913 tons, you get a total of 7,264,913 tons of raw sugar which were available. On the refined basis you add the above figure of actual consumption heretofore given of 5,276,554 tons, and you get a total of 6,789,638 tons which was available for consumption.

On a per capita basis you add the same percentage in the same way; your Honor; and on a raw basis you show available for consumption 104.5 pounds per person.

You show on a refined basis there was available 97.7 pounds per capita.

Now, just one further break-down and we have finished.

If you add the U. S. consumption and the U. S. controlled coupon sugar, you have a total of 7,264,913 pounds which gives you a total available to the United States of 7,577,424 tons—that last statement should have been tons of raw sugar.

The Court: Tons for both?

Mr. Carr: Yes.

The Court: All right.

Mr. Carr: And if you add the refined tons on the same basis, that is, 6,789,638, you get a total tonnage of refined sugar available in 1946 of 7,081,705 tons. And if you add your percentages, you find that you have available per capita in the United States in 1946 109 pounds of sugar per person, that is, raw, or on a refined basis you have 101.9 pounds of refined sugar available per person.

These figures were based upon data taken from the 1945 Agricultural Statistics, Bureau of Agricultural Economics of the United States Department of Agriculture, page 93; and all of the facts or all of the data would be submitted as having been obtained from the official journals or departmental, I suppose, reports by the Bureau of Foreign and Domestic Commerce and the United States Department of Commerce and the Agricultural Department.

I do not think I need designate each one of those.

So that the proof, we would hope to present, would be to the effect that while there was only 75.9 pounds per person used in the United States in 1946, there was actually available 101.9 pounds, showing that there was no actual shortage of sugar." [R. 421-23.]

The power to ration sugar is predicated upon the Second War Powers Act, 50 U. S. C. A. App., 633, Sec. 2(a)(2):

"Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense."

The power, therefore, under the Act to allocate materials is based upon an emergency existing at the time it was passed. It is well settled that emergency legislation of this type falls when the emergency upon which it was

based has passed and no longer exists. The United States Supreme Court has so held.

Chastleton et al. v. Sinclair, et al., 1924, 68 Law. Ed. 841. (This case involved rent control brought on by conditions created by World War I.)

At page 843 the Supreme Court stated:

"We repeat what was stated in Block v. Hirsh, 256 U. S. 135, 154, 65 L. ed. 865, 870, 16 A. L. R. 165, 41 Sup. Ct. Rep. 458, as to the respect due to a declaration of this kind by the legislature so far as it relates to present facts. But, even as to them, a court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. * * * And still more obviously, so far as this declaration looks to the future, it can be no more than prophecy, and is liable to be controlled by events. A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change, even though valid when passed. (Cases cited.)

"The order, although retrospective, was passed some time after the latest statute, and long after the original act would have expired. In our opinion it is open to inquire whether the exigency still existed upon which the continued operation of the law depended. It is a matter of public knowledge that the government has considerably diminished its demand for employees that was one of the great causes of the sudden afflux of people to Washington, and that other causes have lost at least much of their power. It is conceivable that, as is shown in an affidavit at-

tached to the bill, extensive activity in building has added to the ease of finding an abode. If about all that remains of war conditions is the increased cost of living, that is not, in itself, a justification of the act. Without going beyond the limits of judicial knowledge, we can say at least that the plaintiffs' allegations cannot be declared offhand to be unmaintainable, and that it is not impossible that a full development of the facts will show them to be true. In that case the operation of the statute would be at an end."

The proffered testimony would have shown that there was no actual shortage of sugar during 1946 in the United States. Therefore, no power existed under the Second War Powers Act to ration that commodity. It will be noted that the section above quoted giving the President the power provides that the President must be satisfied "that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply * * *."

It would appear to follow that, if there were no shortage, the power to ration sugar no longer existed.

SPECIFICATION OF ERROR VI.

The District Court Erred in Giving Government's Requested Instruction 8.

> "The law does not require that the defendant have actual knowledge of the provisions of the Second War Powers Act of 1942, of General Ration Order No. 8, or the Third Revised Ration Order No. 3, governing the rationing of sugar. All persons, including those who use or deal in sugar, are charged by law with notice of the statute and ration orders and their contents because of publication in the Federal Register, a daily official Government publication which is available to all persons.
>
> "The statute which makes the mere publication of a law or regulation in the Federal Register constructive notice of its contents to every person also contains a provision to the effect that such publication of a document creates a rebuttable presumption that the document was duly issued, prescribed, promulgated, filed."

This instruction completely disregarded the major part of Appellant's defense, namely, lack of intent. It, in effect, advised the jury that they should find the Appellant guilty irrespective of whether he had actual knowledge of the ration orders upon which the counts of the Indictment were predicated. As will hereinafter appear under Specifications of Error VIII and XII, Appellant points out that he was acting upon the premise that, by the termination of O. P. A., he believed sugar rationing ended, and that he did not know of the existence of Executive Order 9745. Therefore, he did not intentionally commit the alleged violations. Since this argument is developed fully under Specifications of Error VIII and XII, reference is made to those arguments and they are adopted as if set forth at this place.

SPECIFICATION OF ERROR VII.

The District Court Erred in Refusing to Give Defendant's Requested Instruction 16.

"Defendants' Requested Instruction No. 16.

You are instructed that the word 'issue,' within the meaning of each count of the Information, means the delivery of a completed sugar ration check to the person to whose account the check is made payable; and that no check which has been altered may be issued. Even though you may be convinced, beyond a reasonable doubt, that defendant, Paul J. Ziegler, in fact, signed his name to the various sugar ration checks alleged in the Information, you are instructed that defendant, Paul J. Ziegler, could not have issued or caused said checks to have been issued if you find that they were altered by anyone other than the defendant prior to, at the time of or after delivery to the person to whose account the checks were made payable.

Third Revised Ration Order No. 3, Sec. 24-1 (c) (15).

Third Revised Ration Order No. 3, Sec. 15.7 (f) (1).

Third Revised Ration Order No. 3, Sec. 15.7 (f) (2).

Given:.....

Refused: J. F. T. O'C., J.

Given as Modified:....." [R. 22].

A material part of the charges was that a sugar ration check was issued by Appellant and which was an overdraft on the account of the West Coast Supply Company. One of the grounds advanced for the motion for a judgment of acquittal was that there had been a variance in that the four checks on which the charges were predicated had been altered. However, the Court denied this. There should have been no disagreement as to the facts on this point,

but the prosecutor did not see fit to concede that there had been an alteration of the checks. Therefore, the jury had to decide whether the name, West Coast Supply Company, had been placed on the checks by Appellant or by some other person. If placed upon the checks by someone other than Appellant, the jury would necessarily have to be advised as to the legal effect of such a finding in order that they might reach a verdict according to law.

If the jury had determined that the name West Coast Supply Company was not upon the checks when they were delivered by Appellant to the various brokers and that thereafter someone added that name to the checks, it would appear to follow without question that the checks were not issued upon the account of the West Coast Supply Company. Furthermore, there would have been an alteration of the checks—particularly as defined by Sec. 15.7 (f) of Third Revised Ration Order No. 3.

The information charges that Appellant issued the various checks; yet the Court, in denying Defendants' Requested Instruction No. 16, refused to instruct the jury as to the meaning of the word "issue" which is defined in Sec. 24.1 (c) (15) as the delivery of a completed check. If the evidence did not sustain the charge that Appellant issued the checks as defined by the foregoing section, then the jury would have been obliged to acquit him. The jury was left to speculate on the applicable law when they should have been told that they must find that the Appellant wilfully issued, within the meaning heretofore mentioned, a sugar ration check in an amount larger than the balance in the account of the West Coast Supply Company before they could convict. The charges, of course, required that the jury find that the checks had been issued on that account. Otherwise it would have had to acquit on the particular charges involved irrespective of the fact that the proof may have shown violations of other sections of Third Revised Ration Order No. 3.

SPECIFICATION OF ERROR VIII.

The District Court Erred in Refusing to Give Defendant's Requested Instruction 22.

"Defendants' Requested Instruction No. 22.

You are further instructed in this connection that, upon publication of an Executive Order of this kind in the Federal Register, the law of the United States creates a presumption that all persons affected by the order have knowledge of such order, which presumption is a rebuttable one. If, therefore, you find beyond a reasonable doubt that the acts and things of which defendants are accused of doing were done by said defendants, and if you further find that, at the time said acts and things were done by said defendants, they did not know that the President had signed Executive Order No. 9745 and were unaware that sugar rationing had continued beyond June 30, 1946, then you must find that the presumption of notice of said Executive Order No. 9745 to defendants has been rebutted.

Title 44, U. S. C. A., Sec. 307.

Flannagan v. United States, 1944, C. C. A. 9, 145 F. (2d) 740.

Kempe v. United States, 1945, C. C. A. 8, 151 F. (2d) 680.

Given:.....

Refused: J. F. T. O'C., J.

Given as Modified:....." [R. 26-27].

The Second War Powers Act, 50 U. S. C. A. App., Sec. 633, provides:

"(5) Any person who wilfully performs any act prohibited, * * * by any provision of this subsection (a) or any rule, regulation or order thereunder, * * * shall be guilty of a misdemeanor. * * *"

There can be no question that the offenses charged in each of the counts of the Information required, among other things, that the Government prove that the appellant wilfully committed the acts charged.

It was a part of Appellant's defense that he acted in good faith in purchasing the sugar believing that sugar rationing had actually come to an end. The evidence showed that he did not learn until the end of July or the first of August, 1946, of the existence of Executive Order 9745, which extended the power of O. P. A. to continue a rationing program [R. 352]. This was after all of the sugar involved had been paid for and delivered.

As heretofore pointed out, Appellant had discussed with various brokers the matter of obtaining sugar upon the termination of the rationing program indicating to the brokers that, from his observation of the debate taking place in Congress, he thought there was a strong likelihood of Congress refusing to extend the program. It was Appellant's contention that, when the President vetoed the Act of Congress extending the O. P. A., he naturally concluded that that terminated sugar rationing.

The Government contends that Appellant did not have to have actual knowledge of Executive Order 9745, which was filed for publication in the Federal Register on July 1, 1946, at 10:32 a. m. [Exhibit F, R. 350-2]. This is the same morning that the purchases of sugar were made by Appellant.

There can be no dispute that publication in the Federal Register does give constructive notice. However, as was pointed out in *Yakus v. U. S.* (321 U. S. 414), 88 L. Ed. 834, p. 854:

> "The regulations, which are given the force of law, are published in the Federal Register, and constructive notice of their contents is thus given all persons affected by them. 44 USCA §307, 9A FCA title 44, §307. The penal provisions of the statute

> are applicable only to violations of a regulation which are wilful. Petitioners have not contended that they were unaware of the Regulation and the jury found that they knowingly violated it within eight days after its issue."

In *Flannagan v. U. S.* (9 Cir.), 145 F. (2d) 740, this Court clearly indicated that, where a person is charged with a violation of a regulation published in the Federal Register, such publication creates a rebuttable presumption of notice to him, but that he is entitled to show lack of actual knowledge of the regulation to establish lack of wilfulness. This Court, on page 741, said:

> "Appellant is charged with knowledge of the maximum price fixed by Regulation 169, since on June 9, 1943, prior to the sale, the regulation, as amended and to take effect on June 19th, was published in the Federal Register. Such publication created a rebuttable presumption of notice to appellant. 44 U. S. C. A., §307. It also appears that instead of rebutting the presumption, the appellant had actual knowledge. He charged in his bills at this time for sides of beef the amount of 24¼¢ per pound, of which charge he said that to the best of his knowledge it was the ceiling price at which he was allowed to sell."

To the same effect:

> *Kempe v. U. S.* (8 Cir.), 151 F. (2d) 680, 684.

Violation of rationing orders must be wilful.

> *Zimberg v. U. S.* (1 Cir.), 141 F. (2d) 132, 137;
> *U. S. v. Fish, Inc.* (2 Cir.), 154 F. (2d) 798, 801;
> *U. S. v. Renken* (D. C., S. C.), 55 Fed. Supp. 1, 3.

The Court, at the request of the Government, instructed the jury that the termination of the Emergency Price Control Act had no effect upon sugar rationing since such was empowered under the Second War Powers Act [R. 624]. The Court also instructed the jury that at all times mate-

rial to the case the O. P. A. was the agency given the power to ration sugar, and it did so [R. 623]. The jury was further instructed that the law did not require that defendant have actual knowledge of the provisions of either Third Revised Ration Order No. 3 or General Ration Order No. 8; that all persons who dealt in sugar are charged by law with notice of ration orders because of the publication of the orders in the Federal Register [R. 626].

An important phase of the Appellant's defense, which was not covered by the Court's instructions, was the claim of Appellant that he believed that sugar rationing had ended because O. P. A. had terminated; that he had no notice of Executive Order 9745 continuing O. P. A. and therefore the violation, if any, was not wilful. Had the President not promulgated that Executive Order, the O. P. A. would not have had any power to continue sugar rationing irrespective of whether some other agency might have had such power. Thus, the Appellant claimed that he was acting upon the theory that, if O. P. A. was actually at an end, then sugar rationing must also be at an end.

In refusing to give Defendants' Requested Instruction No. 22, the Court's instructions had the effect of telling the jury, at least impliedly, to disregard Appellant's claim that he had not acted wilfully. The jury would also conclude that the Court meant to inform it that, since the filing of Executive Order 9745 with the Federal Register, Appellant had actual knowledge of the continuation of the functioning of O. P. A. in connection with sugar rationing. In other words, the Court, in refusing Defendant's Requested Instruction No. 22, disregarded the proposition that goes to the very heart of Appellant's contention of lack of intent, namely, that he honestly believed that sugar rationing no longer existed after the President's veto on June 30, and that he acted in good faith in purchasing the sugar without knowledge that the President had issued the Executive Order.

SPECIFICATION OF ERROR IX.

The District Court Erred in Refusing to Give Defendant's Requested Instruction 26.

"Defendants' Requested Instruction No. 26.

If, from all of the evidence, you should conclude that the name West Coast Supply Company was not placed upon Exhibit 6, which is the check set forth in count 1; Exhibit 5, which is the check set forth in count 3; Exhibit 4, which is the check set forth in count 5; and Exhibit 3, which is the check set forth in count 7, by the defendant Paul J. Ziegler, then you must find that said check or checks is not a ration check as defined by Sec. 24.1 of the Third Revised Ration Order No. 3. In order to be a ration check, such check must be drawn by a depositor against his account and the evidence in this case discloses that Paul J. Ziegler was not a depositor.

Given:.....

Refused: J. F. T. O'C., J.

Given as Modified:....." [R. 30].

This instruction relates to the odd-numbered counts which charge offenses under Sec. 15.7 (d); that is, issuing a check on a specific account when the balance was insufficient to cover the check. That was the offense charged and no other. In order to be overdrafts on the account of the West Coast Supply Company, as charged, the checks had to be drawn on that account. If not drawn on that account, the checks could not be overdrafts on that account. Furthermore, if they were not drawn on any ration account, then they could not be overdrafts at all.

The evidence was conclusive that Appellant had no ration account, so the checks were either drawn on the West Coast Supply Company's account, as charged, or they were not. Appellant contended that the evidence produced by the Government was not only insufficient to estab-

lish that the checks were drawn on the account of the West Coast Supply Company, but, on the contrary, the proof that the name West Coast Supply Company had been added was sufficient to warrant a judgment of acquittal. Since the Court denied that motion and put the case to the jury, it would appear that the jury would have to consider the claim of Appellant that the name West Coast Supply Company was added to the checks and decide whether or not he placed the name there. If the jury found that he did not, then the jury should have been instructed as to the effect of such a finding as a matter of law. In other words, the applicable law to such a finding was necessary to permit the jury to arrive at a verdict in accordance with both the evidence and the law.

Nowhere in the instructions given is there found anything which tells the jury the legal effect of an alteration of the checks. The Court merely gave definitions as follows:

> "Definitions: '[Check]' means a sugar ration check, in the form prescribed by the Office of Price Administration, drawn by a depositor against his account and made payable to the account of a named person.
>
> I charge that that 'alteration' means a change in the terms of a written instrument by a party entitled thereunder, without the consent of the other party, by which its meaning or language is changed" [R. 624].
>
> "'[Issue]' when used with respect to a check, means the delivery of a completed check to the person to whose account the check is made payable" [R. 628].

Defendants' Requested Instruction No. 26 would have informed the jury what to do if it found the checks were altered. Merely telling the jury the meaning of the words "Check," "Alteration" and "Issue" without more would

hardly appear to be a complete, full and adequate instruction on a vital phase of the case.

A recitation of definitions to a jury is indeed a dangerous substitute for a direct and clear explanation of the applicable principles of law. The requested instruction would have supplied that explanation and avoided a situation which was prejudicial to Appellant's defense.

SPECIFICATION OF ERROR X.

The District Court Erred in Refusing to Give Defendant's Requested Instruction 35.

"Defendants' Requested Instruction No. 35.

Paragraph (f), Sec. 15.7 of Third Revised Ration Order No. 3 provides that no check which has been altered may be issued, transferred or deposited, and that a person who holds such a check shall return it to the issuer. Although the defendant, Paul J. Ziegler, may have signed his name to the various alleged sugar ration checks set forth in the Information, in order for you to find that he issued the checks within the meaning of Third Revised Ration Order No. 3, the evidence must convince you that the checks were not altered by anyone after delivery of the checks by Paul Ziegler.

Third Revised Ration Order No. 3, Sec. 15.7 (f).

Given:.....

Refused: J. F. T. O'C., J.

Given as Modified:....." [R. 35].

The argument which would be made in support of this point is substantially the same as that made in support of Specification of Error VII, and is here adopted without repeating it at this place.

SPECIFICATION OF ERROR XI.

The District Court Erred in Refusing to Give Defendant's Requested Instruction 36.

"Defendants' Requested Instruction No. 36.

Sec. 24.1 (c) (5) of Third Revised Ration Order No. 3 provides:

'[Check] means a sugar ration check, in the form prescribed by the Office of Price Administration, drawn by a depositor against his account and made payable to the account of a named person.'

Paragraph 9 of the same section provides:

'[Depositor] means a person who has a ration bank account. * * *'

It is a material part of the charge in counts 1, 3, 5 and 7 that defendant, Paul J. Ziegler, issued a sugar ration check, or checks. In order for the Government to sustain the proof respecting this material ingredient, it is necessary that the checks referred to in each count not only be signed by Paul J. Ziegler, but the proof must show that they were drawn by him as a depositor against his account.

Unless you find beyond a reasonable doubt that he was a depositor and the checks were drawn against his account, you must acquit on those counts.

Third Revised Ration Order No. 3, Sec. 24.1 (c) (5).

Third Revised Ration Order No. 3, Sec. 24.1 (c) (9).

Given:.....

Refused: J. F. T. O'C., J.

Given as Modified:....." [R. 36].

The argument which would be made in support of this point is substantially the same as that made in support of Specification of Error IX, and is here adopted without repeating it at this place.

SPECIFICATION OF ERROR XII.

The District Court Erred in Refusing to Give Defendant's Requested Instruction 37.

"Defendants' Requested Instruction No. 37.

On June 29, 1946, the President of the United States vetoed the bill passed by Congress which would have extended the Emergency Price Control Act of 1942, and on June 30, 1946, that Act terminated and was no longer law. On June 30, 1946, all powers derived by the Office of Price Administration from the Emergency Price Control Act of 1942 terminated. On June 30, 1946, President Truman promulgated and signed Executive Order No. 9745 which provided that the Office of Price Administration was directed to continue to exercise all powers and functions which did not terminate by reason of the termination of the Emergency Price Control Act and such powers that were delegated to the O. P. A. pursuant to the Second War Powers Act.

While this Executive Order was signed by the President on June 30, 1946, it was not filed with the Division of Federal Register, Washington, D. C., as required by statute, until July 1, 1946, at 10:32 a. m., and was not published in the Federal Register until July 2, 1946.

Title 50, U. S. C. A., Sec. 966.

92nd Congressional Record 8092.

11 F. R. 7327.

79th Congress, Second Session, Chapter 671, Public Law 548.

Given:.....

Refused: J. F. T. O'C., J.

Given as Modified:....." [R. 37].

The argument which would be made in support of this point is substantially the same as that made in support of Specification of Error VIII, and is here adopted without repeating it at this place.

The court gave the Government's requested instruction No. 4 which advised the jury that:

> "* * * The termination on July 1, 1946, of the Emergency Price Control Act of 1942 had no effect upon sugar rationing, since sugar rationing was in effect under the Second War Powers Act, which did not terminate.
>
> "I further instruct you that on June 30, 1946, the President of the United States issued an Executive Order by which he continued in effect the Office of Price Administration as the enforcement agent for that purpose. This the President had the right to do."

This, of course, may have been literally true, but the refusal to give Defendant's requested Instruction No. 37 undoubtedly lead the jury to conclude that the court meant that Appellant's contention concerning a lack of wilfulness was not to be considered under the evidence.

It was a vital part of Appellant's defense that the termination of the Emergency Price Control Act caused him to believe that all powers of the O. P. A. terminated and sugar rationing ended. As a matter of fact, all powers of O. P. A. derived from the Emergency Price Control Act did terminate and it was necessary for the President to issue Executive Order 9745 to continue the powers of O. P. A. as to rationing. Now, if Appellant did not have knowledge of Executive Order 9745 at the time of the alleged offenses, and there was unrefuted evidence that he did not, then his defense of lack of wilfulness was an issue for the jury irrespective of the fact that sugar rationing may have continued.

The jury was told in effect that the termination of the Emergency Price Control Act had no effect on sugar rationing; that the President had issued an Executive Order 9745 [R. 624] and that

> "The law does not require that the defendant have actual knowledge * * *. All persons, * * * are charged by law with notice of the statute and ration orders * * * because of publication in the Federal Register, * * * which is available to all persons" [R. 626].

This was extremely prejudicial to Appellant because, in refusing to give Defendant's requested instruction No. 37, the jury was not told that the powers of O. P. A., under the Emergency Price Control Act, did terminate and that Executive Order 9745, which was necessary to continue the sugar rationing powers of O. P. A., was not filed until July 1, 1946, at 10:32 a. m. and was not published until July 2, 1946, the day after all sugar was purchased. The jury should have been so instructed so that these matters could have been considered in connection with Appellant's defense of lack of wilfulness.

SPECIFICATION OF ERROR XIII.

The District Court Erred in Refusing to Give Defendant's Requested Instruction 39.

"Defendants' Requested Instruction No. 39.

One of the specific ingredients of the offense charged in each and every count of the Information is that of wilful intent to do the acts charged. While under the Federal Register Act the filing of an Executive Order creates a rebuttable presumption of notice to the defendant, the defendant may rebut the presumption that he had actual knowledge of the Executive Order.

If you find that the acts and things of which defendant is accused of doing were done by him, and you further find that, at the time said acts and things were done by the defendant, he did not have knowledge that Executive Order 9745 had been signed by the President, and he did not know that sugar rationing had been continued beyond June 30, 1946, then you should find that the presumption of notice of said Executive Order 9745 to defendant has been rebutted.

Title 44, U. S. C. A., Sec. 307.

Flannagan v. United States, 1944, C. C. A. 9, 145 F. (2d) 740.

Kempe v. United States, 1945, C. C. A. 8, 161 F. (2d) 680.

Given:.....

Refused: J. F. T. O'C., J.

Given as Modified:....." [R. 38-9].

The argument which would be made in support of this point is substantially the same as that made in support of Specifications of Error VIII and XII, and is here adopted without repeating it at this place.

Conclusion.

Many of the errors assigned have not been argued in the interest of saving both time and expense. However, it is respectfully submitted that the Specifications of Error treated in this brief disclose that Appellant was not convicted upon the charges laid in the Information and upon competent evidence. It is, therefore, respectfully urged that the matters presented herein warrant this court in setting aside the conviction of Appellant on each and every count.

Respectfully submitted,

Charles H. Carr,
Attorney for Appellant.

APPENDIX.

Second War Powers Act.

50 U. S. C. A. App. Sec. 633 (2).

"Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

* * * * * * * * *

"(5) Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both."

Third Revised Ration Order No. 3.

"Sec. 15.7. *Issuance and use of checks*— (a) *When check to be issued.* A check may be issued only by a depositor and only for a purpose permitted and with the effect prescribed by Revised General Ration Order 5 or this order authorizing the account on which the check is drawn, except as otherwise provided in section 15.8 (d) of this order.

"(b) *How checks are issued.* Each check and its stub must be completely filled out before the check may be issued, but a check register, duplicate voucher or any similar record may be used in place of the check stub. Both check and stub or other record must contain the name of the person to whom the check is to be issued,

the date on which it is drawn and the amount of credits to be transferred. The check must bear the name of the account and the depositor's authorized signature or signatures.

"(c) *Post-dated checks prohibited.* No person may issue or transfer a check before the date it bears.

"(d) *Overdrafts prohibited.* No check may be issued for an amount large than the balance in the account on which it is drawn less the amount of outstanding checks drawn on that account.

"(e) *What checks to be certified.* Only checks which are surrendered to the Office of Price Administration by primary distributors when they file their periodic reports are to be certified or confirmed.

"(f) *Altered or mutilated checks.* (1) No check which has been altered (except as authorized in subparagraph (2) of this paragraph), mutilated or partially destroyed, or which contains an erasure, may be issued, transferred or deposited. A person who holds such a check shall return it to the issuer with a request for a new check. If he is unable to locate the issuer, or to obtain a new check from him, he shall deliver the check to the District Office, with a statement of all the circumstances.

"(2) Checks and their stubs may be altered only by banks before delivering them to depositors and by issuers before or at the time of issuing them, and only to the extent of changing the name of the commodity (for example, from processed foods to sugar) and where necessary, the unit designation (for example, from points to pounds); and checks so altered may be issued, transferred and deposited.

"(g) *Lost checks.* A person who loses or unintentionally destroys a check issued or transferred to him,

or from whom such a check is stolen, shall notify the issuer in writing of the circumstances of the loss or destruction and request that a new check be issued to him. If he is unable to locate the issuer, or to obtain a new check from him, he shall send the district office a statement signed by him of all the circumstances.

"(h) *How altered and lost checks replaced.* A depositor to whom an altered (except as authorized in subparagraph (2) of paragraph (f) of this section), mutilated or partially destroyed check issued by him is returned or who receives a request for the replacement of a lost, destroyed, or stolen check issued by him, may issue a new check. If he does so, he must enter on the stub or other record used in place of the stub or other record used in place of the stub of the original check the fact that it has been lost, stolen, altered, mutilated, partially or completely destroyed, and on the stub or other record of the new check the fact that it replaces the original check. Every depositor shall immediately send his bank a written description of any checks drawn on his account and lost or stolen before deposit, and a description of any checks issued to replace them.

"(i) *Non-depositors may transfer checks.* A person who is not a depositor and is not required to be one, to whom a check is properly issued or transferred, may transfer it to any person for any purpose for which other evidences may be transferred under Revised General Ration Order 5 or this order authorizing the account on which the check is drawn. He must endorse the check before transferring it.

* * * * * * * * *

ARTICLE XXIV—DEFINITIONS.

"Sec. 24.1. *Meaning of terms used in this order.* (a) Whenever the provisions of this order impose or confer duties, obligations, rights or privileges upon an establishment or registering unit, such duties, obligations, rights and privileges shall be considered as being conferred or imposed upon the person owning such establishment or registering unit with respect thereto. Whenever reference is made to an act done or to be done, or to property owned, by an establishment or a registering unit, it shall be deemed to refer to an act done or to be done, or to property owned, by the person owning such establishment or unit in its behalf.

"(b) Words importing the masculine gender include the feminine and neuter genders; and words importing the singular include the plural and vice versa."

"(c) Definitions:

"(1) 'Account' means a sugar ration bank account carried by a bank, in which the bank keeps a record of deposits of stamps, coupons, and checks and of transfers of sugar ration credits.

* * * * * * * * *

"(5) 'Check' means a sugar ration check, in the form prescribed by the Office of Price Administration, drawn by a depositor against his account and made payable to the account of a named person.

* * * * * * * * *

"(8) 'Delivery' means the transfer of physical possession or the transfer of a document of title.

"(9) 'Depositor' means a person who has a ration bank account. A person shall be deemed a separate depositor with respect to each of his accounts.

* * * * * * * * *

"(13) 'Industrial user' means any 'person' who has an 'industrial user establishment.' 'Industrial user estab-

lishment' means any establishment where a person uses sugar in producing, manufacturing, or processing any product other than sugar if the product is not to be used in the preparation or service of food or beverages which the establishment or its owner serves to consumers. It also includes any establishment (except an establishment at which sugar is used only for educational purposes under the direction of the Department of Agriculture or the Extension Service of the Department of Agriculture) at which sugar is used for experimental, education, testing, or demonstration puposes, whether or not a product resulting from such uses is to be used in the preparation or service of foods or beverages which the establishment or its owner serves to consumers. An industrial user who ceases (other than temporarily) to make an industrial use of sugar is not regarded as an industrial user after he ceases.

* * * * * * * * *

"(15) 'Issue' when used with respect to a check, means the delivery of a completed check to the person to whose account the check is made payable.

* * * * * * * * *

"(18) 'Ration credits' means the credits in an account reflecting deposits of stamps, coupons or checks.

"(19) 'Ration evidence' or 'evidences' means checks, coupons, and stamps."

GENERAL RATION ORDER No. 8.

"Sec. 2.9. *Transfer in exchange for invalid or improperly acquired ration document.* No person shall transfer or receive any rationed commodity in exchange for a ration document if he knows or has reason to believe that the ration document was not validly issued or that it was not acquired in accordance with a ration order by the person tendering it."

CHRONOLOGY OF LEGISLATIVE AND EXECUTIVE ACTS UPON WHICH SUGAR RATIONING PROGRAM IS PREDICATED.

Sugar Act of 1937, 50 Stat. 1100 (Title 7, U. S. C., Sec. 1100);

Priorities Act of 1940, Section 2(a)—War and Defense Contracts Act of June 28, 1940 (Title 50, U. S. C. A. App., Section 1152 (2) (c));

Executive Order No. 8629, January 7, 1941 (6 F. R. 119);

Executive Order No. 8734, April 11, 1941 (6 F. R. 1917);

Executive Order No. 8875, August 28, 1941 (6 F. R. 4483);

First War Powers Act of 1941 (Title 50, U. S. C. A. App., Section 601);

Executive Order No. 9024, January 16, 1942 (7 F. R. 329);

Emergency Price Control Act of 1942 (Title 50, U. S. C. A. App., Section 901);

Executive Order No. 9040, January 24. 1942 (7 F. R. 529);

War Production Directive I, January 24, 1942;

Executive Order No. 9069, February 23, 1942 (7 F. R. 1409);

Second War Powers Act of 1942 (Title 50, U. S. C. A. App., Section 633);

Executive Order No. 9125, April 7, 1942 (7 F. R. 2719);

Presidential Proclamation No. 2551, April 15, 1942 (7 F. R. 2826);

General Ration Order No. 8, April 15, 1942;

War Production Supplementary Directive No. IE, April 21, 1942 (7 F. R. 2965);

Ration Order No. 3, April 21, 1942 (7 F. R. 2967);

Executive Order No. 9280, December 5, 1942 (7 F. R. 10179);

Food Directive No. 3, February 15, 1943 (8 F. R. 2005), Redesignated War Food Order No. 56 (8 F. R. 4319);

Executive Order No. 9315, March 15, 1943 (8 F. R. 3279);

Executive Order No. 9322, March 26, 1943 (8 F. R. 3807);

Executive Order No. 9334, April 19, 1943 (8 F. R. 5423);

War Food Order No. 64, May 26, 1943 (8 F. R. 7093);

Executive Order No. 9577, June 30, 1945 (11 F. R. 8087);

Third Revised Ration Order No. 3, as amended January 1, 1946 (11 F. R. 134);

Presidential Veto of HR 6042, June 29, 1946 (92nd Congressional Record 8092);

Executive Order No. 9745, June 30, 1946, Filed July 1, 1946 at 10:32 a. m. (11 F. R. 7327);

Emergency Price Control Act of 1942, as amended, and Stabilization Act of 1942, as amended (Title 50, U. S. C. A. App., Section 966);

Price Control Extension Act of 1946, July 25, 1946 (79th Congress, Second Session, Chapter 671, Pub. Law 548).